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An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City

ALFRED C. AMAN, JR.*

ABSTRACT

This paper explores how administrative law can mitigate the democracy deficit that may occur when privatization shifts political debate into relatively private arenas, changes its focus, or precludes debate altogether. It also argues that the prevailing form and key terms of globalization in the United States derive from neo-liberalism, particularly in the binary division of public/private and their conflation with legal regulation and market responsiveness, respectively. This paper centers specifically on a case study involving the outsourcing of health care for prisoners by a private, for-profit health care provider, Prison Health Services, using it as a means for exploring how a more effective merger of administrative law with the laws governing government contracts might occur. It analyzes two points of possible convergence between administrative law and government contract law—the contract writing phase and the oversight and monitoring activities that occur once the contract is in place, arguing that the historic purposes of government contracting law need to be reconceptualized.

INTRODUCTION

This paper examines government by contract through the lens of administrative law. My primary interest is in exploring how administrative law can mitigate the democracy deficit when privatization shifts political debate into relatively private arenas, changes its focus, or precludes debate altogether.¹ Elsewhere I have argued that the prevailing form and key terms of globalization in the United

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States derive from neo-liberalism, particularly in the binary division of public/private and their conflation with legal regulation and market responsiveness, respectively.² That formulation tends to foreclose public participation in ways that amount to a significant democracy deficit. But those are not the only available terms today.³ I will argue that administrative law can potentially ameliorate the democracy deficit by providing arenas within which decisions of the private or public-private hybrid sector might be made subject to a continuing political process. I develop a procedural approach that is relevant to privatization in general, although my main concerns are with contexts where delegations of fundamental state responsibilities to private actors affect marginal, vulnerable groups such as prisoners and the poor. In so doing, I do not want to suggest that what I am studying is somehow also marginal. Rather, I wish to suggest that decision-making models developed in these contexts vividly illustrate a general state of affairs affecting all aspects of society.

This paper focuses specifically on a case study involving the outsourcing of health care for prisoners. In New York City, prison health has been contracted out to a private, for-profit health care provider, Prison Health Services (PHS). PHS is the largest private provider of inmate health services in the United States and is responsible for medical care or pharmaceutical services to approximately 270,000 of the 2.1 million inmates nationally. This has been a growing business. The company has experienced a compounded annual growth rate of almost 30 percent since 1998.⁴

My primary interest in this case study is as a means for exploring how a more effective merger of administrative law with the laws governing government contracts might occur. A fusion of these bodies of law might help create sites for political discourse that can encourage what we might call a “politics for human rights,” particularly when it comes to marginal groups in society. Questions such as the level of resources committed to such basic concerns as the health of a vulnerable population in confinement, as well as the coverage and quality of that care, should be raised and debated sufficiently early in the decision-making pro-

1. For an analysis of privatization and various forms of the democracy deficit in the context of globalization, see ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004).

2. *E.g.*, *id.* at 8.

3. *See id.* at 3.

4. *Prison Health Services' Hard Time*, BUS. WK. ONLINE, May 18, 2005, http://www.business-week.com/bwdaily/dnflash/may2005/nf20050518_2061_db008.htm.

cess to be realistically considered.⁵ Not only are such questions important from a humanitarian point of view, but they often represent a point of convergence between the processes of privatization and their effects on human rights.

In making these arguments, I will focus on two points of possible convergence between administrative law and government contract law—the contract writing phase and the oversight and monitoring activities that occur once the contract is in place. I will argue that the historic purposes of government contracting law need to be reconceptualized. Government service contracts in these contexts represent a kind of regulatory rulemaking, not just an agreement between a buyer and a seller. As such, they should involve various stakeholders and members of the community in addition to elected officials to assure that a fundamentally political process is not unduly narrowed to a simple low- or least-cost contracting approach.

The use of contracts as the legal mechanism to carry out the state's responsibility to provide essential human services to prisoners can unduly insulate some key considerations from public view and debate before deficiencies inherent in some of these contracts see the light of day. The newspaper exposé, government monitors, and various other after-the-fact remedial attempts to penalize faulty performance effectively limit citizens' rights and responsibilities in such matters to the essentially commercial decision of whether to delegate certain tasks to the private sector in the first place and, perhaps, to whom these tasks should be delegated. Implicit in outsourcing decisions of this type, however, is the idea that entering into a contract involves a relatively private negotiation between a buyer and a seller: one that cannot be wholly public without seriously undermining the negotiation process. Such process that does exist at this stage is focused less on achieving the substantive goals of the contract and more on limiting its costs in monetary terms. Sealed bids and variants of this approach seek to ensure that a low-cost, if not the least-cost, provider is chosen and chosen in a way that is not susceptible to corruption.

Also, implicit in the contracting processes as they currently exist is the assumption that there are likely to be many providers of the service sought, willing and able to contract with the government. In this sense, there is seldom any distinction made between contracts with a vendor of a product or a service an agency needs to do its job and a service that might be at the heart of the agency's duties or a responsibility so fundamental that it cannot outsource it without taking into account political issues beyond cost. Indeed, the processes used are often based on

5. See, e.g., Amartya Sen, *Human Rights and Asian Values: What Lee Kuan Yew and Li Peng Don't Understand About Asia*, NEW REPUBLIC, July 14, 1997, at 33-34.

the assumption that we are replacing a government monopoly with an open market consisting of many competitors, all vying for the government contract. This, in turn, suggests that the competition for the contract will yield the most highly efficient and skilled provider and, moreover, that these are not competing goals.

This, however, is often not the case—at least with regard to prison health care. Evidence suggests that there are, in fact, very few competitors for such contracts.⁶ In New York City's largest such contract, there was only one bidder. But even if a real competition had ensued, the primary basis of the competition tends not to be in terms of imaginative solutions to difficult problems. It is almost wholly in terms of cost and compliance. Cost, of course, is a factor in any governmental decision to hire a contractor or to perform the service itself. No one wants to waste tax dollars. At the same time, when legal frameworks such as those governing public contracts focus only on costs in economic terms, the human needs and the human consequences of resource decisions fade from public view. Put another way, those wishing to win a contract will have a strong incentive to make promises that may be extremely difficult to keep. Quality checks in prison health stop at the agency level—or with the muckraking press. City and state review deal primarily with after-the-fact compliance issues.

The least-bid government contract has its variants, such as those that provide governments some discretion when social services are involved. Such approaches, however, remain focused primarily on cost and an open bidding procedure. They may be appropriate for infrastructure projects such as roads, bridges, or public buildings, or services such as building cleaning, copy machine repair, or even food services. But they take on a negatively transformative effect when applied to more fundamental human needs such as health.

6. The 2000 contract competition to provide inmate health care to the New York City prison system involved only three bidders, two of which were local to the New York municipal area (Capital Health Management, based in Queens and St. Vincent's Hospital and Medical Center, based in Manhattan) and the Tennessee-based PHS, which was awarded the contract. Eric Lipton, *Company Selected for Rikers Health Care*, N.Y. TIMES, Sept. 19, 2000, at B3. Consolidation of private providers may also be having a negative effect on competition. Government prison systems may drop a provider due to dissatisfaction with the medical care provided, only to find itself being stuck with the same provider again after a merger or acquisition of the new provider by the previously dropped company. For example, in 1999, PHS purchased EMSA Government Services, a large competitor which had replaced PHS as the provider in Polk County, Florida, prior to the acquisition. The purchase had the effect of returning inmate medical care back to PHS, much to the displeasure of the county. Paul von Zielbauer, *As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, N.Y. TIMES, Feb. 27, 2005, at A1 (first of the three-article series, *Harsh Medicine*).

Government contracts and their emphasis on least-cost approaches tend to privilege a least-cost economic discourse, keeping other kinds of values out of the conversation. They also further an assumption that private providers are superior to public providers in this regard, given the role of profit as a great motivator. In short, the shift to contract as the primary means of legislating in these areas tends to realign the public's ideas of its own responsibilities with regard to the means and ends of carrying out fundamental public responsibilities. Unless we recognize the new role that such contract processes play in governance overall, such contracts are effectively separated from the social compact. The current political preference for the private sector and market ordering is too often insensitive to that possibility, resulting in the neglect of basic human needs. Effectively hidden from public view, prisoner health is commoditized in a manner tantamount to roads, bridges, and other natural things—and this should worry all of us. In this paper, I am less concerned with the label we affix to whomever is chosen to provide such services as health care than I am with the legal effects that label might trigger, especially when it comes to the processes used, the breadth of issues considered, and the range of public voices allowed to be heard. Perhaps the major issue is funding: how much is society willing to allocate to the care of prisoners? This issue is a political question and needs to be addressed early on in the contracting process.

I argue that a modicum of process early on in the contracting phase coupled with effective proactive monitoring by private as well as governmental bodies can help create opportunities for problem solving and generate a more active political process around basic human needs. A fusion of administrative law with public contract law can help create a space for a politics to develop that takes seriously the true costs of dealing with the human dimensions of outsourced public responsibilities. To develop these arguments, part I sets forth a case study of how New York City outsourced its prison health care responsibilities to a private entity, PHS, and some of the consequences of that contract. Part II then looks to the history and basic purposes of government contracts. The emphasis of this body of contract law is on avoiding corruption in the awarding of contracts as well as maximizing cost controls. In part II, I focus on the law as it applied to the decisions to outsource health care to PHS, as well as to the monitoring of the contract between the City and PHS. The Conclusion sets forth an administrative law procedural approach designed to democratize outsourcing processes. The label we affix to the service provider—public, private, or hybrid—matters more than it should in terms of understanding how that provider should or should not be reg-

ulated. I suggest we refocus our administrative values on the democratic nature of the decision-making processes employed and empower the participation of stakeholders beyond the contracting agency itself. In addition, it is important that we recognize explicitly the difference between third-party beneficiary contracts such as those involved in prison health care and other forms of procurement where corruption and cost are the sole or primary issues involved.

I. OUTSOURCING PRISONER HEALTH CARE IN NEW YORK CITY

A series of articles published in the New York Times in early 2005 detailed the apparent failure of the City to provide adequate health care to inmates at Rikers Island and other prison facilities. The three-part series⁷ contained a litany of incidents in which it appeared that Prison Health Services, the private health provider that the City had contracted with for delivery of health services to prison inmates, had failed to deliver adequate care to the prisoners entrusted to it. PHS's failures had allegedly resulted in several deaths due to negligent care, improper or withheld medications, and avoidable suicides. The neglect had touched not just the adult prison population of Rikers Island, but extended to the City's juvenile justice population as well.

The tragic events detailed in the New York Times were unfortunately not unfamiliar. Only five years earlier, the City had faced similar problems with a different partner, St. Barnabas Hospital (St. Barnabas), with whom the City had contracted in 1998. Prior to 1998, medical care for New York City inmates had been provided by a nonprofit hospital, Montefiore Medical Center. Care was provided on a fee-for-service basis in which the City's aggregate costs, and Montefiore's total compensation, depended upon the amount of medical services provided to inmates. However, as the prison population increased in the 1990s, and the level of care needed for individual inmates escalated due to drug addiction, increased rates of H.I.V. infection, and other factors, including mental health issues, the costs of providing health care on a fee-for-service basis rose as well.⁸ As of

7. The three part series, entitled *Harsh Medicine*, included the following articles: von Zielbauer, *supra* note 6; Paul von Zielbauer, *Missed Signals in New York Jails Open Way to Season of Suicides*, N.Y. TIMES, Feb. 28, 2005, at A2; Paul von Zielbauer, *A Spotty Record of Health Care for Children in City Detention*, N.Y. TIMES, Mar. 1, 2005, at A3.

8. See Melody Petersen, *Prisons Cut Costs by Managed Care*, N.Y. TIMES, Dec. 26, 1996, at A1. In addition to the general increase in prison populations and health concerns such as the need to treat and control H.I.V. infection and transmission among inmates, the New York City prison system experienced some specific challenges related to increased heroin use in the mid 1990s. Mathew

1996, the City was spending approximately \$150 million annually on medical bills and had begun to look for a way to cut costs.⁹ The Montefiore arrangement had not solved this problem, and the City sought another approach. Even though Montefiore was considered to be doing "a relatively good job in difficult conditions,"¹⁰ the fee-for-service model was seen as being part of the problem of increasing costs since it provided little incentive to the hospital to control costs.

In order to achieve its desired cost savings, New York's Health and Hospitals Corporation (HHC) abandoned its longstanding relationship with Montefiore in 1998 and entered into a managed care contract with St. Barnabas, a nonprofit health care provider, for prison inmate health services for Rikers Island inmates. The three-year, \$350 million contract was to provide the approximately 15,500 inmates jailed each day at Rikers with comprehensive health care, including screenings and treatment for diabetes, asthma, hypertension, pregnancy, and sexually transmitted diseases.¹¹ The partnership was pitched as a way for the City to save money through the implementation of a managed care system.¹² Under the contract, St. Barnabas was to be held to a set of thirty-five performance standards that if not met would require the hospital to pay financial fees until the standards were achieved.¹³ Notably, this was the first time that benchmarks to measure performance had been included in a contract to provide inmate medical care.¹⁴ Problems with the contract and the provision of care began to arise almost immediately.¹⁵ These problems would eventually lead the City to seek a different partner and change its contracting method.

Purdy, *New Inmates Reflect Surge in Use of Cheap But Potent Heroin*, N.Y. TIMES, Dec. 3, 1995, at A49. The New York Times reported that the number of arriving inmates addicted to heroin at Rikers Island had increase by almost 25% in 1995. *See id.* This increase in addiction required additional expenditures, which came in the form of expanded detoxification wards, bringing back hundreds of treatment beds that had been eliminated to save money, and other treatment actions. *Id.*

9. Petersen, *supra* note 8.

10. *Id.* (quoting Robert Gangi, Executive Director of the Correction Association of New York, a nonprofit monitor of the city's jail system).

11. Esther B. Fein, *Deal to Bring Rikers Inmates Managed Care*, N.Y. TIMES, Sept. 19, 1997, at B3.

12. The City expected to save \$11 million in the first year alone. *See id.*

13. Katherine E. Finkelstein, *Monitor Unit Says City Fails on Jail Care*, N.Y. TIMES, Apr. 30, 1999, at B1.

14. *Id.*

15. Inmate complaints increased threefold from what they had been under Montefiore, and criminal investigations were eventually initiated in regard to the care provided to over a dozen prisoners, including four who died. Lipton, *supra* note 7.

At the end of the first year of the St. Barnabas contract, the medical director for the Office of Correctional Health Services (CHS), Dr. Audrey Compton, resigned in protest, accusing the City of doing too little to monitor St. Barnabas's performance under the contract, with resulting negative consequences for inmates' health.¹⁶ A New York Times story also expressed concerns, noting that the number of inmates referred to outside hospitals for medical care had dropped sharply since St. Barnabas had taken over the Rikers Island contract.¹⁷

Shortly thereafter, a review by the New York City Board of Corrections (City Board) basically validated Dr. Compton's allegations, charging that city officials had done a poor job monitoring the care provided by St. Barnabas. The City Board found that St. Barnabas staff had worked to prevent CHS from verifying performance data and that the hospital was failing to meet at least thirteen of the performance standards set out in the contract.¹⁸ The mayor, Rudolph Giuliani, called for tightened standards, and the City drafted a "new protocol" for the monitoring of St. Barnabas's performance in prison health care—including additional benchmarks, minimum staffing levels, and mandating inmate access to certain procedures and tests.¹⁹ However, in response to the City's pressure, St. Barnabas decided not to pursue a renewal of the contract,²⁰ and the City was forced to look elsewhere for a health care service partner.²¹

That partner came in the form of Prison Health Services, a for-profit corporation that was the largest private provider of medical care in prisons and jails across the country. In 2000, New York's Office of Correctional Health Services (CHS), a subdivision of the City's Department of Health and Mental Hygiene (DOH), awarded Prison Health Services the new contract for health services for its prison inmate population, including Rikers Island. In 1998, St. Barnabas had

16. David Rohde, *Rikers Doctor Says She Quit Over Worsening Medical Care*, N.Y. TIMES, Oct. 7, 1998, at B1.

17. While conspicuously refusing to draw any conclusions from the statistic, the Times noted that in February 1997, when Montefiore was still in charge, 345 Rikers prisoners were sent to a hospital. Ian Fisher, *Caring for Poor, and for Profit: Bronx Hospital Shakes Up the Medical Establishment*, N.Y. TIMES, Mar. 9, 1998, at B1. In February 1998, however, after St. Barnabas had taken over medical care at the prison, only 121 inmates had been sent to a hospital. *Id.*

18. Finkelstein, *supra* note 13.

19. Katherine E. Finkelstein, *City Raising Standards for Provider of Jail Care*, N.Y. TIMES, May 1, 1999, at B5 (quoting Joseph J. Lhota, Deputy Mayor of New York City).

20. St. Barnabas "defended its performance, criticizing the city's oversight and the poor condition of the medical system it inherited," but declined to place a bid for the new contract and did not seek renewal. Lipton, *supra* note 6.

21. See Jennifer Steinhauer, *St. Barnabas Won't Renew City Contract*, N.Y. TIMES, Dec. 19, 1999, at A56.

competed for the contract with at least five other medical service companies,²² but PHS was one of only three companies submitting proposals for the contract in 2000.²³ The partnership became very controversial, with Prison Health Services failing to meet established performance standards that allegedly resulted in several avoidable deaths. Nevertheless, the contract was renewed in 2005.

Prison Health Services is now the largest private provider of medical care to prisons and jails in the nation, with contracts in twenty-eight states that collectively cover about one out of every ten inmates behind bars.²⁴ The 2000 contract with the City of New York increased the level of funding for inmate medical services by \$25 million per year and was created with the failures of the St. Barnabas contract in mind. Several provisions were inserted into the new contract in hopes of improving the level of care inmates would receive.²⁵ The contract increased the number and specificity of performance standards that Prison Health Services was required to meet to forty,²⁶ compared with the thirty-five that had been required under the St. Barnabas contract.

The contract also set specific and detailed staffing levels and called for 100 percent compliance with the standards, compared with the 90 or 95 percent compliance that had been required of St. Barnabas.²⁷ Financial penalties were increased substantially for failure to meet the new standards. The payment model was shifted back to a fee-for-service model, away from the managed care arrangement that had been put in place under St. Barnabas, in an attempt to remove the profit incentive for the provider to skimp on treatments for inmates.²⁸ As had been the case with St. Barnabas, acute medical care would continue to be provided by New York City hospitals.²⁹

At the time of the contract award, some concern was raised over the reputation and past performance of PHS.³⁰ A New York Times article noted that while

22. See Petersen, *supra* note 8.

23. The other companies were both local: Capital Health Management based in Queens, and St. Vincent's Hospital and Medical Center, based in Manhattan. Lipton, *supra* note 7.

24. von Zielbauer, *supra* note 6.

25. Eric Lipton, *City Setting High Standard for Jail Pact*, N.Y. TIMES, Dec. 1, 2000, at B1.

26. *Id.*

27. *Id.*

28. *Id.*

29. Lipton, *supra* note 6.

30. One particular concern was whether the company would be able to hire enough personnel to meet the service demands that it would face under the new contract. The company was known to have already run into trouble in finding an adequate amount of nurses and other employees to service contracts in Maine, Pennsylvania, Georgia, and Florida. However, in the years leading up to the New York contract, the company had also received generally positive evaluations in regard to the medical care it provided. Lipton, *supra* note 25; Eric Lipton, *New York Jails Pose Biggest Test*

PHS had “largely succeeded in cutting prison health costs for the governments it serves,” the company’s track record was not unblemished.³¹ Earlier in 2000, PHS had been replaced by local authorities in a county in Maine after the company had been determined to have “routinely failed to provide” the expected level of care, and the company appeared to be plagued with a “regular string of problems at prisons large and small.”³² The company was also accused of being subject to frequent turnover of qualified doctors, while at the same time continuing to employ less qualified or poorly performing doctors “for extended periods of time.”³³ At least one of PHS’s contract partners indicated that the company’s performance “required constant attention and monitoring.”³⁴

Despite these concerns, the contract with PHS was received with tentative optimism by prisoners’ rights advocates and was ultimately awarded by a nine to one vote at the CHS board.³⁵ However, in the years to follow, the contract with PHS would become just as problematic, if not more so, than had been the case with St. Barnabas. City officials expressed concern in the first year of the contract that the medical care of inmates was not improving as quickly as had been hoped.³⁶ The New York City Board of Corrections (Board), a citizens’ committee appointed by the mayor and the City Council to monitor treatment of inmates, expressed concern in 2001 that inmates were having to wait too long to get access to, and needed treatment from, specialists.³⁷ Later that same year, HHC conducted a comprehensive review of PHS and concluded that the company was failing “to provide adequate service in more than two dozen [contract] categories,” including failures to deal with tuberculosis and sexually transmitted disease.³⁸ City officials voiced their hope that care would improve, but staffing and care quality issues have continued to arise on a fairly regular basis.³⁹

for Health Firm with Mixed Past, N.Y. TIMES, Sept. 25, 2000, at A1 [hereinafter Lipton, *New York Jails Pose Biggest Test*].

31. Lipton, *New York Jails Pose Biggest Test*, *supra* note 30.

32. *Id.*

33. *Id.* (quoting Robert L. Cohen, former medical director at Rikers Island and leader of the Philadelphia inspection of Prison Health Services).

34. *Id.* (quoting Marianne Pasha, spokeswoman for the Pinellas County sheriff’s office).

35. Lipton, *supra* note 25.

36. Eric Lipton, *Panel Faults Progress of Prison Health Care*, N.Y. TIMES, June 15, 2001, at B3.

37. *Id.*

38. Katherine E. Finkelstein, *City Says Inmate Care Fails in Most Contract Categories*, N.Y. TIMES, July 19, 2001, at B2.

39. In 2002, staffing shortages forced PHS to deal with a labor controversy involving its Rikers Island nurses protesting having to work forced overtime. Ruth Bashinsky, *Rikers Nurses to Rally in Protest of OT*, N.Y. DAILY NEWS, April 12, 2002, at A1. Also in 2002, staffing shortages resulted in

As detailed in the 2005 New York Times series, while the City did realize some direct cost savings, serious service delivery problems under the PHS contract have been ongoing and persistent. The performance standards that were set up to assure quality care to prison inmates were only met 39 percent of the time in the first year of the contract.⁴⁰ The company has been accused of understaffing its facilities, using unqualified medical personnel, not providing full subscription and mental health care to inmates in an attempt to cut costs, not adequately tracking patient records, and focusing more on technical paperwork requirements to meet the letter of the contract without actually providing the adequate level of medical care that the contract sought to achieve for the City's prisoners. These deficiencies, it is alleged, have resulted in poor and negligent care and the deaths of inmates that should have been easily prevented. An evaluation of the company's performance, conducted after the contract with the City was renewed in early 2005, concluded that PHS had failed to meet many of its most basic treatment goals.⁴¹

In addition, the basic legitimacy of the arrangement with PHS has been called into question on legal grounds. Under New York State law, for-profit corporations that provide medical care must be owned and controlled by doctors.⁴² PHS has two corporations headed by doctors that it claims are in charge of medical care, but some state investigators have alleged that this is a sham—that medical decisions are being improperly made by corporate executives on the basis of whether they will increase profits, rather than serve inmates' health needs.⁴³ In 2005, an investigation by New York State officials concluded that the PHS contract was illegal because the contract appeared to make "doctors at Rikers answerable to Prison Health executives in Tennessee."⁴⁴

the court-ordered planning of mental health care for discharged inmates to be transferred away from PHS to the New York City hospital system. Dan Janison, *City's Hospital System Steps In*, NEWSDAY, June 2, 2002, at A4.

40. von Zielbauer, *Missed Signals*, *supra* note 7.

41. Paul von Zielbauer, *Medical Care at Rikers Fails in Evaluation*, N.Y. TIMES, June 10, 2005, at B1.

42. N.Y. BUS. CORP. LAW § 1507 (McKinney 2003) ("A professional service corporation may issue shares only to individuals who are authorized by law to practice in this state a profession which such corporation is authorized to practice and who are or have been engaged in the practice of such profession in such corporation or a predecessor entity, or who will engage in the practice of such profession in such corporation within thirty days of the date such shares are issued.").

43. Paul von Zielbauer, *Medical Group at City Jails is Investigated*, N.Y. TIMES, May 11, 2005, at B1.

44. Paul von Zielbauer, *Investigators Called Rikers Medical Contract Illegal, State Panel Says*, N.Y. TIMES, Nov. 22, 2005, at B1.

Beyond the legal question, the State Commission of Correction (Commission), a body appointed by the governor to oversee jail and prison standards, has been critical of the quality of medical care provided to inmates by Prison Health Services. According to the New York Times, the Commission “has repeatedly condemned Prison Health for flouting state medical standards, hiring poorly qualified doctors and nurses and failing to properly treat several of its sickest patients.”⁴⁵ In responding to State criticisms, New York City officials have sometimes stepped out of their traditional role as monitors to act as PHS’s defender.⁴⁶

So why did this happen again? Why had the City’s best intentions gone awry, its oversight and performance requirements failed? Why, despite all the attempts at monitoring and the provision for specific performance criteria that had been drafted into the current contract in response to previous failures, was PHS doing such an apparently bad job at caring for the health of prison inmates? Why, too, has there been apparently so little in the way of consequences to PHS for its poor performance? PHS has received bad publicity, but neither government nor market forces seem to be acting to change the company’s behavior. The company received an extension of the contract in 2003,⁴⁷ and the contract was renewed in 2005. Furthermore, the CEO of PHS has stated that the critical media attention has resulted in no loss of business for the company.⁴⁸

Questions such as these arise with regard to at least three phases of the process described above. The first phase involves the fundamental decision to outsource prison health care to a for-profit corporation, specifically, PHS. The second phase involves the terms and conditions under which the private provider of these services agrees to perform these tasks—that is, the contract itself. The third phase involves the implementation of the contract involved, including monitoring performance. As we shall see below, the law governing the process by which public contracts are negotiated and implemented is concerned primarily with obtaining low-cost, if not the least-cost, providers of the services in question in a manner free from corruption. Various forms of public bidding procedures are authorized. Over the years, however, these processes have not fully taken into account the

45. Paul von Zielbauer, *Rikers Suicide Called a Glaring Example of Poor Care*, N.Y. TIMES, Apr. 4, 2005, at B1.

46. See *id.* In response to the Commission’s harsh criticisms of PHS’s health record and the Commission’s statements that PHS’s explanation of its legal arrangements “beg credulity,” officers of the City’s health department defended the company to state officials, stating that “Prison Health does a satisfactory job and performs its work legally.” *Id.*

47. *N.Y. Extends Rikers Island Contract to Private Company*, CORRECTIONS PROF., Apr. 25, 2003.

48. *Prison Health Services’ Hard Time*, *supra* note 4.

changing nature of the services being contracted for, as we have moved from services designed primarily to help a public agency carry out its duties to contracts involving the private performance of public responsibilities. Nor have any distinctions been made between medical care and other types of services, or, more generally, between human services and procurement of other kinds.

In short, the questions this paper addresses do not end with the issues of whether and how PHS failed to carry out its contractual obligations. I focus on three additional issues: (1) whether there were adequate opportunities for deliberation over the basic decision to outsource these tasks in the first place; (2) what role the public had—if any—beyond the administrative agencies involved in shaping the contracts through their comments; and (3) whether performance monitoring is adequate and in the right hands.

II. GOVERNMENT CONTRACTS

A. Historical Overview

Government contracts have long been an important part of the way government functions at all levels—federal, state, and local. No government can be expected to perform independently all of the tasks relevant to its operations, nor should it. In 1955, for example, the U.S. Bureau of the Budget issued a policy statement encouraging governmental agencies to rely on the private sector to supply needed goods and services wherever practicable. This has since been reissued and codified in the Office of Management and Budget Circular A-76, which states:

In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on private sources to supply the commercial products and services the Government needs.⁴⁹

This 1955 policy is consistent with the way the Administrative Procedure Act (APA) deals with the contracts agencies enter into to obtain such products and ser-

49. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRC. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES ¶ 4 (May 29, 2003).

vices. The APA specifically exempts any "matter relating to . . . public property, loans grants, benefits, or contracts" from its rulemaking requirements.⁵⁰ This provision has been viewed as pervasive and broad, with more than 10,000,000 federal contracts outstanding at any given time.⁵¹ The very pervasiveness of federal contracts has been used by courts to justify the exception on the ground that it would be impractical and therefore unreasonable "to require the various agencies of government to publish [a] notice in the Federal Register and to hold hearings each and every time they entered into, rescinded, or canceled a government contract."⁵²

Contracting for commercial services necessary to carry out agency duties is one thing, but outsourcing the very duties the agency was created to undertake or fundamental responsibilities that flow from these duties is quite another. A contract to provide services to an agency necessary for it to carry out its duties arguably differs considerably from a contract to carry out the very duties we expect a public body to perform. We traditionally have had a political expectation that the agency itself will undertake those actions for which it is directly responsible and whose performance it was created to ensure. Where it cannot—as in the case of health services—the responsibilities it has for the care of prisoners nonetheless remains with the contracting agency.

Quite apart from political expectations, the law itself may differ depending upon who carries out certain tasks. The constitution may or may not apply to a private actor in certain situations. Various statutory provisions such as the Freedom of Information Act may not apply to a private party. More importantly, the nature of the contracts involved is likely to differ. For example, a contract to outsource prison health care has as its primary beneficiaries the prisoners themselves, whose welfare is at stake. A contract to help provide janitorial services to a particular agency, on the other hand, has as its focus the agency itself. Yet little dif-

50. 5 U.S.C. § 553(2) (1966).

51. See *Contracting Out of Jobs and Services: Hearing Before the Subcomm. on Employee Ethics and Utilization of the H. Comm. on Post Office and Civil Service*, 95th Cong. 31, 38-40 (1977). Given that contracting has only become more prevalent since the 1977 hearing from which the 10,000,000 figure was drawn, the number of federal contracts outstanding is likely greater than that today. The exception has been applied not only to the formation of contracts, but also to matters arising under contracts. For example, two circuit courts of appeals have upheld the applicability of the exemption to regulation of tenancy in federally funded housing projects on the ground that the tenant/landlord relationship is based on contract. Apparently, courts have assimilated traditional notions of freedom of contract into their broad interpretation of the APA exception. *E.g.*, *Hous. Auth. of Omaha v. U.S. Hous. Auth.*, 468 F.2d 1 (8th Cir. 1972); *Langevin v. Chenago Court, Inc.*, 447 F.2d 296 (2nd Cir. 1971).

52. *Rainbow Valley Citrus Corp. v. Fed. Crop Ins. Corp.*, 506 F.2d 467, 469 (9th Cir. 1974).

ferentiation between these situations is ever recognized in the processes governing the decision to outsource these different types of responsibilities, and more importantly, the processes used to carry out these transactions. There is, however, one important exception at the federal level, at least. OMB Circular A-76 places some limits, at least in theory, on what can be outsourced: specifically, matters deemed to be “inherently governmental” may not be outsourced.⁵³

“Inherently governmental” is a term that seemingly defies any hard and fast definition and, as applied over the last twenty years or so, has facilitated the widespread use of outsourcing to deal with any number of agency needs and services, almost all of which have been deemed commercial. For example, outsourcing the construction and management of prisons is commonplace at the federal level and in many states today, as is the determination of who might be eligible for welfare funds, capable of manufacturing defense related equipment, or guarding our ports. Functions once thought to be at the heart of a particular agency’s responsibilities increasingly have now been turned over to private entities under various contractual provisions to carry out agency tasks. The “inherently governmental” limitation has proven to be relatively ineffectual in limiting or helping to determine just what should or should not be outsourced. Put another way, the definition of what is and what is not inherently governmental has evolved considerably, especially in light of increasing reliance on markets and private actors to carry out what once were governmental operations.

Reliance on the market for the actual provision of government services coincides with technological changes that have spurred deregulation throughout the 1980s and 1990s in various administrative agencies and increased competition in a variety of industries. Telecommunications, for example, once regulated by the Federal Communications Commission primarily as a natural monopoly, has increasingly been deregulated with new mixes of the market and government regulation coming into existence. Energy industries such as natural gas and electricity also have moved dramatically in the direction of marketized, incentive-based regulation. Airlines have been substantially deregulated and, of course, banking and financial services generally have given way to competitive, market-based forms of regulation. Market approaches to regulation have increasingly become the norm with regard to environmental, health, and safety concerns as well.

Contracting out government responsibilities to private actors is an extension of these ongoing trends. Indeed, what especially typifies what I have called the global

53. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 438 (2006).

era of regulation⁵⁴ is the extensive use of contracts to delegate public responsibilities to private actors. Particularly striking, though, is the fact that the law governing the contracting processes that make these delegations possible has remained largely static, even in the face of major changes in their purpose and effect. Indeed, third-party beneficiary contracts involving fundamental responsibilities of the agency itself, responsibilities with human rights issues often at stake, are treated very much the same as any other agency contract. The application of traditional government contracting processes to the outsourcing of fundamental agency responsibilities lessens considerably the ability of concerned citizens to be aware of, much less raise in a timely fashion, the political issues inherent in decisions to use markets to decide how best to serve vulnerable populations such as prisoners. This, in my view, contributes significantly to the democracy deficit that outsourcing of this kind can create.

The next section sets forth in some detail how New York City law applies to agencies wishing to outsource services for which they are responsible to the private sector. I will focus primarily on health and the law that applied to the City's decisions to hire and rehire PHS.

B. Outsourcing in New York City

New York City uses an extensive network of contractors to accomplish much of the day-to-day work required to administer a city of over 8 million people.⁵⁵ The contracting process generally involves the application of a competitive sealed bidding system,⁵⁶ but alternative processes are available when it is determined that it is not "practicable or advantageous to the city to use competitive sealed bidding."⁵⁷ The responsibility of both the contracting process and the subsequent monitoring

54. See AMAN, *supra* note 1, at 30-50, 99-117.

55. New York City Department of City Planning, Population Division, The "Current" Population of New York City (2005), <http://www.nyc.gov/html/dcp/html/census/popcur.shtml>.

56. See CITY OF N.Y., N.Y., CHARTER ch. 13, § 312(b)(1) (2004) ("Except as provided for [in other sections], contracts shall be awarded by competitive sealed bidding.").

57. *Id.* at § 312(c)(1) (2004). The Charter sets out five reasons for finding such a "special case": (i) specifications cannot be made sufficiently definite and certain to permit selection based on price alone; ii) judgment is required in evaluating competing proposals, and it is in the best interest of the city to require a balancing of price, quality, and other factors; iii) the good, service or construction to be procured is available only from a single source; iv) testing or experimentation is required with a product or technology, or a new source for a product or technology, or to evaluate the service or reliability of such product or technology; or v) such other reasons as defined by rule of the procurement policy board." *Id.* § 312(c)(1)(i-v). The Procurement Policy Board may also designate that a specific type of good or service is not subject to competitive bid requirements. *Id.* § 312(c)(2).

and evaluation of the contracting partner's performance under the awarded contract falls primarily on the agency seeking the desired good or service.

The law governing the contracting process is a combination of laws set out in the New York City Charter (the Charter) and rules promulgated by the Procurement Policy Board (PPB). Chapter 13 of the Charter sets out the basic contracting methods and requires that if competitive sealed bidding is not to be used, then the agency must use the "most competitive alternative method" set forth in the Charter that fits the situation.⁵⁸ These other methods include competitive bids from pre-qualified vendors,⁵⁹ competitive sealed proposals,⁶⁰ competitive sealed proposals from pre-qualified vendors,⁶¹ "sole source" or single source procurement,⁶² or other procurement methods that may be devised by the PPB.⁶³ No matter which method is used, the emphasis under the law is the procurement of the desired good or service at the lowest possible cost—a manner that encourages competition, prevents favoritism in the award of contracts, and avoids fraud or corruption.⁶⁴ Most general contracts are to run for one-year terms, but the PPB rules allow for client services contracts of greater than one year in length when a contract of longer than one year is needed to promote a "continuity of service," when the performance of the services contracted for will involve high startup costs, or when changing contractors will involve high transition costs.⁶⁵

Under a competitive sealed bidding process, the agency seeking the contract first publishes a notice of an invitation for bids.⁶⁶ Once all the bids have been re-

58. *Id.* § 317(a). Contracts of more than \$5 million dollars that are not awarded using either competitive sealed bids, competitive sealed bids from prequalified vendors, or competitive sealed proposals require the approval of the mayor. *Id.* § 317(b).

59. *Id.* § 318.

60. *Id.* § 319.

61. *Id.* § 320.

62. *Id.* § 321.

63. *Id.* § 322.

64. These values are consistently reiterated in the statutes and rules governing the contracting process. For example, the PPB rules contain a policy statement that "[p]ublic employees responsible for the expenditure of taxpayer dollars have a responsibility to . . . make certain that their conduct does not raise suspicion or give the appearance that they are in violation of their public trust," and that contracts should be procured in ways that "encourage competition, prevent favoritism, and obtain the best value in the interest of the City and the taxpayers." CITY OF N.Y., N.Y., Procurement Policy Board Rules § 1-03(a)(1)(i), *in* 4 THE RULES OF THE CITY OF NEW YORK (2007). Among other criteria, the PPB rules also state that a decision to procure technical, consultant, or personal services should be made, at least in part, on the basis of whether using procurement is cost effective. *Id.* § 2-01.

65. *Id.* § 2-04(b).

66. CITY OF N.Y., N.Y., CHARTER ch. 13, § 313(b)(1) (2004).

ceived, the agency has two options. It may reject all the bids if it determines it is in the best interests of the City to do so, or the agency must award the contract to the "lowest responsible bidder."⁶⁷ The determination of who is "responsible" under the law is primarily an economic decision, meaning that the contractor must have the financial wherewithal to follow through on the obligations it will accept under the contract. However, the decision is not only pecuniary but includes consideration of whether the contractor "possesses moral worth" and the "skill, judgment, and integrity" to handle the proposed contract.⁶⁸ There is no hearing requirement under this process unless it is determined that an award of the contract will result in "displacement" of city employees.⁶⁹ Since inmate health services were being handled by non-government entities prior to either the PHS contract or the St. Barnabas contract, it is unlikely that this would have been a concern during the contracting processes.⁷⁰

Unlike competitive sealed bidding, the use of competitive sealed proposals would trigger the requirement for a public hearing on the proposed contract.⁷¹ Under a competitive sealed bidding method, the agency in charge would put together a request for proposals,⁷² which will set forth the "factors and criteria" by which the contract will be awarded and evaluated.⁷³ Contracts solicited under a competitive sealed proposal method do not have to be awarded to the "lowest responsible bidder," but instead are to be awarded to the "responsible offeror whose proposal is determined to be the most advantageous to the city, taking into con-

67. *Id.* § 313(b)(2).

68. *Picone v. City of New York*, 29 N.Y.S.2d 539, 541 (Sup. Ct. 1941); *accord* CITY OF N.Y., N.Y., Procurement Policy Board Rules § 1-01(e), *in* 4 THE RULES OF THE CITY OF NEW YORK (2007). (defining responsible bidder as "[a] vendor who has the capability in all respects to perform in full the contract requirements, and the business integrity and reliability that will assure good faith performance.").

69. CITY OF N.Y., N.Y., CHARTER ch. 13, § 312(a)(1) (2004).

70. While it is not obvious on the face of the contract which of the methods discussed in this section was used in awarding the Prison Health Services contract, it appears that the standard competitive bidding process method was used, and not the more flexible, albeit more procedurally stringent, method of competitive sealed proposals detailed below.

71. CITY OF N.Y., N.Y., Procurement Policy Board Rules § 2-11, *in* 4 THE RULES OF THE CITY OF NEW YORK (2007). Contracts to be awarded by competitive sealed bidding, competitive sealed bidding from prequalified vendors and emergency contracts are exempted from the general requirement that contracts of \$100,000 or greater require the contracting agency to "hold a public hearing to receive testimony regarding the proposed contract." *Id.* § 2-11(a)-(b).

72. The required contents of a "request for proposals" is set out in the Procurement Policy Board Rules. *Id.* § 3-03(a).

73. CITY OF N.Y., N.Y., CHARTER, ch. 13, § 319 (2004) ("No other factors or criteria shall be used in the evaluation and award of the contract except those specified in the request for proposals.").

sideration the price and such other factors or criteria as are set forth in the request for proposals.”⁷⁴ The agency is required to send the request for proposals to a “sufficient number of vendors.”⁷⁵ The determination of whether an offeror qualifies as a “responsible offeror” is subject to the same “moral worth” considerations as in the determination of whether a bidder is “responsible” in the competitive sealed bidding process.⁷⁶

C. Contract Monitoring

In contracting situations, the contracting agency is often placed as the primary monitor of contractor performance. New York law follows this pattern, placing the burden of performance monitoring squarely on the contracting agency’s shoulders.⁷⁷ While the agency is given direct authority for the oversight of contract performance, the main vehicle for complaints about a contractor’s performance appears to be the borough presidents.⁷⁸ This makes sense generally, since it is likely to be the borough president that has the best sense of whether a contractor is performing its duties satisfactorily, as the borough president will be the person most likely to be receiving complaints from the third-party clients being serviced by the contract within his or her borough. However, this mechanism would seem to provide very little oversight capability in the case of inmate health care, since inmates are under the direct restraint of the City, and, especially in the case of the Rikers Island inmates, separated from the general population. Borough presidents may still receive complaints about inmate care from family and friends of inmates, but are unlikely to receive complaints directly from prisoners.

The mayor is also empowered under New York City law to “evaluate the integrity, performance, and capability” of contractors.⁷⁹ The mayor can take on this responsibility directly, or designate a City agency to assist in the process. The New

74. *Id.*

75. CITY OF N.Y., N.Y., Procurement Policy Board Rules § 3-03(d)(1)(i), *in* 4 THE RULES OF THE CITY OF NEW YORK (2007).

76. *See supra* note 68 and accompanying text.

77. CITY OF N.Y., N.Y., CHARTER ch. 13, § 333(a) (2004) (“Each agency letting contracts shall monitor the performance of every contractor.”).

78. *See id.* § 333(b)(1)–(4). These provisions lay out the steps required when a borough president submits a written complaint about the performance of a contract to the contracting agency. The requirements include a mandated period within which the agency must respond to the borough president in writing, and mechanisms by which a “contract performance panel” can be established in order to conduct a performance hearing. *Id.*

79. *Id.* § 335.

York City Board of Corrections is one agency that operates in this capacity, having been appointed by the mayor to oversee the treatment of inmates generally. The New York State Board of Corrections is also empowered under the state constitution to oversee the treatment of inmates state-wide, including inmates housed within the New York City prisons.

This formal monitoring structure existed prior to the PHS contracts and remains currently in place. Despite this structure, however, there have been consistent performance problems, and the effectiveness of the City's monitoring has itself been called into question.

The New York Times has called the monitoring of the standards established by the PHS contracts "slapdash, subjective and lenient," with the mechanisms in place being "better at measuring the company's adherence to technical contract obligations . . . than . . . at showing the actual quality of . . . care."⁸⁰ Performance reports are issued by CHS, the City agency in charge of the PHS contract, and are claimed to represent a "comprehensive auditing effort that has six auditors in city jails every day reviewing inmates' medical charts."⁸¹ However, critics of the City's monitoring efforts have pointed out that PHS is allowed to review, and given an opportunity to change, the data upon which performance is being evaluated, and then is further allowed to appeal and contest the results of any performance evaluation once complete.

The problems begin with the assembly of the data upon which an evaluation will be made. In regard to the daily audits, the company is given in advance a list of the inmate charts that CHS wants to review on a particular day. This practice has led to accusations that company employees have used the advance notice to correct errors and fill in missing information before providing them to auditors.⁸² A provision that allows PHS to produce "loose paper" after the completion of an audit has also come under fire since it might provide a mechanism to revise audit scores even after an audit is completed.⁸³ When failures in performance have been established, city officials have allowed PHS to come up with its own plan on how to correct the problems.⁸⁴ Fines against PHS for failed performance have been assessed by the City but appear to have had little effect on the overall levels of care.⁸⁵

80. Paul von Zielbauer, *Evaluation of Medical Care Provider in the City's Jails Is Questioned*, N.Y. TIMES, Dec. 26, 2005, at B1.

81. *Id.*

82. *Id.*

83. *Id.*

84. von Zielbauer, *supra* note 41.

85. As Hildy J. Simmons, chairwoman of the Board of Correction stated, "It seems like the needle is moving in the wrong direction, not the right one." *Id.*

Finally, as criticism of PHS's performance grew more heated and state agencies began their own reviews and joined the ranks of critics, CHS seems at times to have acted not as the monitor of PHS, but as its advocate and defender. The New York Times pointed out that since 2001 city officials in charge of PHS performance evaluations have excused violations so that on at least nineteen occasions the company received a passing score instead of a failing one.⁸⁶ Further, when a state investigation announced that it reached the conclusion that the PHS contract was illegal, the parent agency to CHS defended the contract by reference to documents prepared by PHS's legal counsel.⁸⁷ At least one official within the city agency charged with monitoring PHS's performance acknowledged that there was an incentive to defend PHS because failures on the company's part could negatively impact the public's perception of CHS, which chose PHS and negotiated the contract.⁸⁸

These monitoring difficulties are not unique to this particular situation, and are of the type we might anticipate given the nature of the contract involved and the monitoring systems in place to evaluate it. Effective monitoring of a company's performance of these types of service contracts can be very difficult to do and involve several pitfalls that must be avoided.

Lester M. Salamon has noted that there are three main differences to consider when looking at the evaluation of contracts to serve third-party beneficiaries as opposed to the more traditional contract that is entered into to provide goods or services directly to the contracting agency.⁸⁹ The first major difference noted by Salamon lies in the nature of the third party being served, which is often politically, socially, or economically disadvantaged. This can work against the establishment of a clear definition of performance and make the evaluation of a contractor much more difficult, since the service it is being contracted to deliver is often complex and subject to being affected by factors outside of its control. In addition, the labor intensive nature of the services being performed means that it may be difficult to control or reduce costs while still providing the adequate level of service desired. This factor makes "the exercise of discretion by the service

86. von Zielbauer, *supra* note 80.

87. See von Zielbauer, *supra* note 44.

88. A health department official explained that the agency was trying to make PHS look good because, "If P.H.S. looks bad . . . we look bad." von Zielbauer, *supra* note 80.

89. Ruth Hoogland DeHoog & Lester M. Salamon, *Purchase-of-Service Contracting*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 319, 320 (Lester M. Salamon ed., 2002). Salamon refers to these types of contracts as "human service contract[s]." *Id.*

provider[] . . . a critical element of the process itself.”⁹⁰ Finally, because of the factors above, the third parties being served may have limited opportunities or resources available to allow them to register their dissatisfaction with the service, and the contracting agency will be required to “invest significant time and expense to review and monitor the service delivery process.”⁹¹ This third factor becomes especially important in the case of inmate health care since the contract is dealing with a population that is not only more likely to be disadvantaged socially and economically, but is also literally under restraint by the government.

While there is an increased need for vigilance in the evaluation process, the monitoring of the contractor’s performance by the contracting agency can lead to its own problems. It seems intuitive that the contracting agency may be the best qualified government entity to evaluate the performance of the contractor. The contracting agency is likely to be familiar with the services being offered by the contractor and may even have some institutional expertise in the delivery of the good or service. Since the contracting agency is the institution with the most direct responsibility, legally and politically, for the ultimate success or failure of the contractor’s performance, the agency should be motivated to ensure that the contractor’s performance meets a high level of compliance with the expectations of the agency as set forth in the contract; however, this last fact may also create counterincentives within the agency to excuse, ignore, or cover up poor performance by the contractor.

As the New York prison health case suggests, if a contractor comes under fire from outside critics, be they governmental or private, the contracting agency may be incentivized to act as the contracting company’s defender or advocate in order to deflect blame directed toward the agency for real or perceived failure to prevent the contractor’s poor performance. The agency may feel that attacks upon the performance of the contracting company are also attacks upon the judgment of the agency that selected the company and negotiated the contract under which the company has operated. If this occurs, the agency’s role as monitor would be flipped on its head, and any real oversight lost since the agency would then become invested in helping the company appear to have successfully performed the contract requirements, regardless of the actual state of affairs.

The public and the media can also sometimes act as a secondary line of oversight in the monitoring of a contractor’s performance. In the case of inmate health care, however, the normal obstacles to monitoring of government contracts by pri-

90. *Id.*

91. *Id.*

vate persons are compounded by a third-party beneficiary population that is separated from general public view and for whose welfare the public does not share a high level of concern. The provision of inmate health care attracts little public attention.⁹² Even when sufficient interest exists, obtaining the information necessary to make performance determinations can be very difficult for private persons. New York law requires that agencies keep contractor performance information in a "central place,"⁹³ but actually gaining access to the information can be a daunting task. The PPB rules require that contract information, including performance evaluations, be kept in a central database,⁹⁴ but access to this database by private persons is limited to one physical location in the City's downtown.⁹⁵ No easily accessible alternate location for contract information, online or otherwise, appears to be available, and so private citizens without access to the mechanism above may have to rely on direct requests to the agencies for contract information and performance data.

If all else fails, the courts are often seen as being the last point at which a non-performing entity can be exposed and punished. This approach too can be problematic, both in terms of its efficacy and its availability in third-party beneficiary contract situations. The effectiveness of courts as monitors may be in doubt simply on the point that it often takes legal claims several years to make their way through the court system. By the time a plaintiff is able to acquire a favorable judgment, the contractor may no longer be employed by the contracting agency, be working under different contract, or have otherwise moved away from the conduct the suit seeks to address.⁹⁶ Beyond the effectiveness of the courts as per-

92. "The quality of health care in jails and prisons gets little public attention, even though everyone involved acknowledges that the stakes are high, and not just for inmates. The vast jail complex at Rikers Island is New York's crucible of public health, where doctors have a chance to treat some of the city's sickest and most troubled people before they return to the street." von Zielbauer, *supra* note 80.

93. CITY OF N.Y., N.Y., CHARTER ch. 13, § 333(a) (2004).

94. CITY OF N.Y., N.Y., Procurement Policy Board Rules § 1-04(e), *in* 4 THE RULES OF THE CITY OF NEW YORK (2007).

95. Private citizens can go to the Public Access Center, which is located in Manhattan, and obtain access to the City's contracting database. The Center is only open during normal business hours on the weekdays. There is no charge to access the system, but physical copies of contracts, performance reports, or other data may be obtained for a fee. Mayor's Office of Contract Services, Public Access Center – How to Get Information About City Contracts and Contractors, <http://www.nyc.gov/html/moc/html/pac.html> (last visited May 11, 2007).

96. For example, several of the cases against St. Barnabas concerning its performance under the 1998 contract did not show an ultimate resolution until well after the contract had expired. *E.g.*, *Elie v. St. Barnabas Hosp.*, 724 N.Y.S.2d 749 (App. Div. 2001) (upholding plaintiff inmates' right

formance monitors, there is also the question of whether breach of contract claims may, in general, be brought by third-party beneficiaries.

The case law in New York provides inmates with the ability to bring such lawsuits. In *Murns v. City of New York*,⁹⁷ for example, the parent of a female inmate who committed suicide brought claims for wrongful death and breach of contract, among others, against St. Barnabas Hospital and a doctor employed by the company. The inmate had taken her life by hanging herself from a light fixture in her cell at Rikers Island, and had a history of suicide attempts including a previous attempt at Rikers Island.⁹⁸ St. Barnabas, as defendant, sought dismissal of the claims on several grounds and won a limited dismissal of a portion of the claims. In regard to the claim of breach of contract, St. Barnabas argued that such a claim should be barred due to a lack of standing, stating that inmates were not third-party beneficiaries to the contract. The court rejected this argument, however, and upheld the right of the parents to proceed on the breach of contract claim. The court looked to other New York cases that had dealt with prison contracts and reasoned that when a contract provides that "performance is to be rendered directly to a third party under the terms of an agreement, that party must be considered an intended beneficiary."⁹⁹ The court held that since St. Barnabas was required under the contract to provide medical care directly to inmates on Rikers Island, the inmates could not help but be considered the intended beneficiaries under the contract, and would therefore have sufficient standing to bring a breach of contract claim.¹⁰⁰

While the case law in other jurisdictions is less clear on this point,¹⁰¹ the cen-

to proceed with claim against hospital for negligence in the performance of services and violations of § 1983).

97. No. 00 Civ. 9590 (DLC), 2001 U.S. Dist. LEXIS 6287 (S.D.N.Y. May 15, 2001).

98. *Id.* at *2.

99. *Id.* at *15–16 (quoting *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 600 (2d. Cir. 1991)).

100. *Id.* at *16.

101. For example, the California case of *Martinez v. Socoma Cos.*, 521 P.2d 841, 843 (Cal. 1974), upheld a lower court's sustaining of defendant's demurrer against plaintiffs' claim for breach of contract. Plaintiffs were unemployed persons who sought to bring breach of contract claims against companies that had contracted with the state government pursuant to the Economic Opportunity Act of 1964 to provide training and employment to disadvantaged and unemployed individuals. California law distinguished between contract participants as creditor beneficiaries, which were owed some duty of performance by the promisor under the contract, and incidental beneficiaries, which might gain from the promisor's performance, but were not granted any legal right of recovery against promisors in the event of a breach. The California Supreme Court found that the purpose of the contract was not to provide a direct benefit to plaintiffs, but rather to achieve the

tral issue as to whether claims of this type may be brought is whether a clear duty of care toward the inmates who are to receive medical services is established under the contract. The argument for a duty of care in the case of prison health care contracts would seem to be fairly straightforward, and the New York courts have adopted this reasoning. This does not mean, however, that a contractor could not negotiate a contract that exempts it from third-party liability.¹⁰²

Even if the right to bring third-party claims is present, the nature of the beneficiary in inmate health care contracts works to further complicate the use of courts as monitors. While New York courts have authorized claims for breach of contract by inmates¹⁰³ and inmate families,¹⁰⁴ these cases do not appear to have moved beyond the preliminary stage and so it remains unclear what a successful award brought by inmates would look like in this context.

III. CONCLUSION: USING ADMINISTRATIVE LAW TO BALANCE THE GROUND RULES

Amartya Sen has argued that

the governmental response to acute suffering often depends on the pressure that is put on it, and this is where the exercise of political

public purpose of utilizing the training and employment of disadvantaged persons as a means of improving the neighborhood in which plaintiffs lived. Since neither the contract, nor the underlying legislation, indicated a purpose of providing a gift to defendants, and the contract did not express any intent that compensation should be paid to defendants in the event of a breach, the court found that the defendants did not have standing to bring a claim.

102. Indeed, the contract between PHS and New York City includes an indemnification agreement which provides that the City will indemnify PHS, its directors, members, officers, and agents from "any and all liability, loss or damage arising from or in connection with the provision and delivery of health services," as long as the act is "done or omitted in good faith and with ordinary discretion" pursuant to PHS's bylaws and any rules, regulations or statutes governing the Corporation. Ex. H, art. VI, § 6.1, Agreement for the Provision of Correctional Health Services (Dec. 19, 2000) (copy on file with the author). The agreement further provides that the City will assume liability for the Corporation and its doctors for "any and all liability, loss or damage for malpractice." *Id.* § 6.2. These provisions do not technically relieve PHS of third-party beneficiary liability, but the effective result is much the same. Under the indemnification agreement, the City will defend any malpractice suit brought against PHS or its medical staff, and assume any judgments entered against it. This broad indemnification does not appear to have been part of the previous contracts for inmate care, and would seem to relieve PHS of any possibility of liability for a failure of care, except in cases of gross negligence.

103. *E.g.*, *Elie*, 724 N.Y.S.2d 749.

104. *E.g.*, *Murns*, No. 00 Civ. 9590 (DLC), 2001 U.S. Dist. LEXIS 6287.

rights (voting, criticizing, protesting, and so on) can make a real difference To concentrate only on economic incentives (which the market system provides) while ignoring political incentives (which democratic systems provide) is to opt for a deeply unbalanced set of ground rules.¹⁰⁵

This section will suggest some procedural reforms designed to improve the balance between the largely economic processes and goals that govern outsourcing today at all levels of government and the political process. My focus is at the agency level.

Accommodating the democracy needs of various groups and interests need not require massive amounts of new procedure. Indeed, it is with the actual contract and contracting process that the most important reforms are most urgently needed. None of the statutes dealing with government contracting processes allow for direct involvement of citizens, beyond the agency representatives involved, in the contracting process. Three basic models are present, two of which are inherent in the statutory provisions governing outsourcing in New York, but both of which are insufficient when it comes to ensuring a process open to all relevant stakeholders in these proceedings. The first is the bidding model and is clearly the primary way government contracts are created. This approach focuses almost exclusively on the lowest cost bidder and its processes are primarily concerned with corruption and bias in the awarding of contracts. Government contracts should not be a means of bestowing political favors, but a means of choosing the most efficient bidder in a fair way.

A second model, also inherent in the sealed bidding proposal approaches described above, can be likened to requests for proposals (RFPs) or, in effect, a grant application process. The government agency puts out for public consumption a call for proposals to help it solve a problem or carry out certain duties it is legally bound to do. Bidders make proposals to do just that and, presumably, there is at least room for creativity, not only in terms of how certain bidders seek to meet the government's call, but in how the government frames its proposals in the first instance. It can issue an RFP in a way that seeks to stimulate a problem-solving competition among the prospective bidders. Like the first approach, however, this form of bidding does not include citizen participants who seek to define precisely what the problems really are as well as propose solutions that are not limited by least-cost programmatic considerations. Finally, there is an administrative law

105. Sen, *supra* note 5, at 34.

model based on the contract as a form of administrative rulemaking, which, for the reasons discussed below, is a preferable procedural approach to outsourcing contracts for social services designed to serve vulnerable populations that have little or no political or market power.

The call for a contract should be treated like a notice of a rule in the making; the contract itself is that rule, or, in effect, a complicated and specific piece of legislation, with policy judgments inherent in the document regarding not only what is to be done, but the priorities to be set in accomplishing those goals. The contract should be posted on the agency's web site, calling for public comments, suggestions, alternative language, and ways to achieve its substantive reform goals from anyone who wishes to comment. In our extended case study, this would include prisoners and their representatives as well. Moreover, extensive information should be provided on the track records of firms competing for the contract. There should be fair competition among the bidders. All of them should agree that if they are chosen, they will be subject to regular reporting requirements and a modified Freedom of Information Act, thereby allowing interested members of the public to make relevant inquiries about their operation while the contract is in place. Once a contract is entered into, it is important that discussions involving how the contract is in fact working continue to occur with some frequency. The nature of the enterprise—in our extended example, prison health care—requires ongoing monitoring of the contract terms, as well as opportunities to comment on its administration and to suggest amendments regarding the on-going duties and commitments of the private actor.

An important function of such an expanded role for administrative procedure in the contracting process is to accommodate most, if not all, of the interests of the many groups and individuals involved. A process such as this allows them to speak to one another as well as the ultimate decision maker. The simplicity of notice and comment procedures makes such transparency and communication reasonably efficient, and this need not create undue impediments to the bargaining process. Indeed, the purpose of these citizen-oriented procedures is to ensure that the many views and voices involved in such public-regarding private arrangements are heard. It is not just that there is a public dimension involved; it is that there are genuine public values at stake that necessitate debate and contest. The various positions of individuals and groups are not points along a spectrum suggesting either more or less procedure. They are political views that can and often do overlap with the goals and preferences of seemingly very different groups. There should be an opportunity for the political issues inherent in such social service contracts to be debated and discussed beyond cost considerations alone.

The role of administrative law procedure is not to settle the question of whether privatization is good or bad, in general, but rather to accomplish two fundamental, specific goals: the creation of forums in which politics can develop around the complex public-private combinations that typify privatization today in social service contexts, and the enhancement of opportunities for all interested individuals and groups to communicate with one another (and decision makers) in these specific contexts. Government contracting processes designed primarily for standard procurement issues involving roads or bridges cannot easily be applied to the outsourcing of social services intended to be the primary responsibility of public bodies and the complex human dimensions they involve. Least-cost bidding approaches to the democracy needs of society cannot possibly capture the complexity of democracy in practice, particularly when we are dealing with such human issues as health. Something as simple as basic notice and comment will add much to the legitimacy and, I believe, the success of the new public-private world in the making.